THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT: SURPASSING THE "ECONOMICALLY SIGNIFICANT" THRESHOLD

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I. INTRODUCTION

On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) issued a Notice of Proposed Rulemaking to revise its Americans with Disabilities Act (ADA) regulations to be in compliance with the new ADA Amendments Act (ADAAA).[1] The Notice of Proposed Rule Making interprets the requirements of the ADAAA[2], which Congress passed in late 2008 and which became effective on January 1, 2009, to make it easier for employees and applicants who allege disability discrimination to establish that they are disabled as defined by the ADA.

The Notice of Proposed Rule Making includes, along with the interpretations of the requirements of the ADAAA, a Preliminary Regulatory Impact Analysis.[3] In the Preliminary Regulatory Impact Analysis, the EEOC reviews existing research highlighting the costs and benefits of providing reasonable accommodation under the ADAAA.[4] After reviewing the research, the EEOC suggests that the effect on the economy of the changes to the EEOC's regulation as a result of the ADAAA will not be "economically significant," that is, they will be below the $100 million threshold of economic significance.[5]

As the EEOC readily admits, there are many assumptions made concerning the evaluation of the regulatory impact of providing reasonable accommodations under the ADAAA.[6] Although the differences between the ADAAA and the ADA are not extreme, the economic implications of the new amendments may very well be. These differences, specifically the newly broadened definition of who can qualify as a person with a disability,

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[1] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended; Notice of proposed rulemaking, 29 C.F.R. § 1630 (2009).

[2] ADA Amendments Act of 2008, 42 U.S.C.A. § 12101(b) (West 2008).

[3] 29 C.F.R. § 1630.

[4] *Id.*

[5] *Id.*

[6] *Id.*

may very likely have a greater economic impact than anticipated in the EEOC's proposed regulations.

This note will discuss the purpose and history of the ADA generally and the newly enacted ADAAA in particular. It will then analyze the Preliminary Regulatory Impact Analysis proposed by the EEOC and will specifically address each of the assumptions made in order to determine the likely impact the ADAAA and the new EEOC regulations will have on employers. Next, the note will argue, contrary to the EEOC's prediction, that the ADAAA and the new EEOC regulations will have an "economically significant" impact and will have a greater effect on employers than proposed by the EEOC in the initial regulatory impact analysis. Finally, it will conclude by providing employers with an explanation about how to provide reasonable accommodations under the ADAAA in light of the increased economic impact.

II. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT: AN OVERVIEW

The Americans with Disabilities Act of 1990 was signed into law on July 26, 1990 by President George H. W. Bush.[7] The ADA was supposed to open doors for the more than forty-three million Americans with disabilities and expectations were high,[8] especially in the employment context.[9] It is in the employment context, however, that individuals with disabilities have continued to face discrimination and disappointment even after the passage of the ADA.[10] The biggest problems with the ADA resulted from the definition of "disability."[11] Under the ADA, proving that a plaintiff had a disability was a nearly impossible task.[12] Consequently, instead of protecting individuals with impairments, the ADA was interpreted to exclude many individuals from protection and from obtaining reasonable accommodation.[13] In fact, the definition of "disability" was interpreted so narrowly by courts that plaintiffs lost a huge majority of cases.[14] According to Professor Ruth Colker, Distinguished University

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[7] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990).

[8] Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008).

[9] *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act,* 58 VAND. L. REV. 1807, 1812-13 (2005).

[10] *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants,* 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999).

[11] *See id.* at 146.

[12] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002); Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).

[13] *Id.*

[14] Colker, *supra* note 10.

Professor and Heck Faust Memorial Chair in Constitutional Law at The Ohio State University Moritz College of Law, defendants prevailed in more than ninety-three percent of ADA employment law cases decided on the merits at the trial level and in eighty-four percent of reported cases on appeal.[15] Such a result was certainly not consistent with the purpose of the ADA. Consequently, the ADA Amendments Act was signed into law by President George W. Bush, eighteen years after his father signed the ADA into law, to resolve these problems in favor of plaintiffs.[16]

A. *Defining an Individual with a Disability*

One purpose of the ADA Amendments Act of 2008 is to address the problems associated with the definition of an individual with a "disability."[17] One major problem with the definition of "disability" under the ADA was the way it was being interpreted by the Supreme Court. In 2002, the United States Supreme Court held in *Toyota Manufacturing Company v. Williams* that the terms used in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[18] The Court reasoned that merely having an impairment does not make one disabled for purposes of the ADA, but that to qualify as disabled a claimant must further show that the limitation on the major life activity is "substantial."[19]

This "demanding standard" interpretation prevented many disabled individuals from receiving reasonable accommodations and thus, from being able to work. The "demanding standard" interpretation is specifically rejected in the Findings and Purposes section of the ADAAA.[20] In fact, the ADAAA requires that the definition of disability "be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[21] The ADA specifically cites to the *Toyota* decision in two of its purposes, stating that its purposes are:

> (4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to

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[15] *Id.*
[16] ADA Amendments Act of 2008, 42 U.S.C.A. § 12101(b) (2008).
[17] *Id.* § 12101(a)(3).
[18] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).
[19] *Id.* at 195.
[20] 42 U.S.C. § 12102(4)(A).
[21] *Id.*

> be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
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> (5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[22]

Another problem with the ADA was with the interpretation of specific terms in the definition of disability. The ADAAA retains the same three-prong definition of disability, but includes instructions to courts about how the terms "substantially limits," "major life activities," and "regarded as" should be interpreted.[23] The ADAAA expands the definition of "substantially limits" by rejecting the Supreme Court's holding that the term must be defined as an impairment that "prevents or severely restricts" an individual from performing a major life activity.[24] Congress left the specific definition of "substantially limits" to be determined by the EEOC instructing the Commission to define it more broadly than it was defined in *Toyota Motor Manufacturing, Kentucky, Inc v. Williams*.[25]

The ADAAA also explicitly rejects the Supreme Court's holding in *Sutton v. United Air Lines, Inc.*[26] The Court in *Sutton* held that determining whether a person has a disability must be done by considering any mitigating or corrective measures the individual uses to offset the effects of an impairment.[27] The ADAAA rejects this interpretation by stating specifically that determining whether an individual has an impairment that substantially limits a major life activity must be done "without regard to the

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[22] *Id.* § 12101(B)(4)(5).
[23] 42 U.S.C. § 12102(1).
[24] *Toyota*, 534 U.S. at 198.
[25] 42 U.S.C. § 12102(2)(b)(6).
[26] *Sutton*, 527 U.S. at 471.
[27] *See id.* at 482.

ameliorative effects of mitigating measures."[28] Although the ADAAA excepts contact lenses and eyeglasses from this rule, it stipulates that it includes medication, artificial aids, assistive technology, reasonable accommodations, and "learned behavioral or adaptive neurological modifications."[29] The ADAAA further states that if an employer uses a qualification standard based on an individual's uncorrected vision, the employer must show that the qualification standard is consistent with business necessity and related to the job.[30]

The ADAAA also addresses the problem encountered by individuals with episodic impairments or impairments that are in remission.[31] Such individuals have historically had extreme difficulty establishing that their impairments are substantially limiting.[32] In order to address this problem, the ADAAA states that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[33]

Finally, the ADAAA addresses the problems associated with the interpretation of "major life activities." The ADA did not contain a definition of "major life activities."[34] The EEOC also chose not to define what constitutes a major life activity under the ADA but instead provided an illustrative list.[35] This lack of definition led to confusion and dispute about what constituted a major life activity, specifically whether nonvolitional bodily activities, like functions of the immune system, removing waste from the blood, and normal cell growth, constituted major life activities.[36] As it had defined the other terms, the Supreme Court defined the term "major life activities" narrowly.[37] The Court held that the term "major life activities" referred to activities that are of "central importance to most people's daily lives."[38]

In response to the confusion and in response to the Supreme Court's narrow interpretation, the ADAAA provides more clarification for the term "major life activities." The ADAAA clarifies that an impairment need only limit one major life activity in order to be considered a

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[28] 42 U.S.C. § 12102(4)(E)(i).
[29] *Id.*
[30] *See id.* § 5(b).
[31] *Id.* § 12102(4)(D).
[32] 42 U.S.C. § 12102(4)(D).
[33] *Id.*
[34] 42 U.S.C § 12101.
[35] 29 C.F.R. § 1630.2(i).
[36] Long, *supra* note 6, at 222.
[37] *Toyota,* 534 U.S. at 198.
[38] *Id.*

disability.[39] In the Findings and Purposes section, the ADAAA rejects the Supreme Court's holding that "major" as it is part of the definition of "major life activity" should be interpreted strictly.[40] The ADAAA still does not provide a definition of what constitutes a major life activity, but instead provides a nonexhaustive list of major life activities including several new additions.[41] This is important because the list of major life activities is now included in the statute itself rather than merely in the regulations.[42] The ADAAA also clarifies that the term "major life activities" includes, among other things, the operation of "major bodily functions."[43] This clarification made it clear that an impairment that substantially limits nonvolitional bodily functions can qualify as a disability.[44] The EEOC, in its proposed regulations, adds to the ADAAA list by also including sitting, reaching and interacting with others,[45] thereby further expanding the types of major life activities included.

B. *Defining an Individual "Regarded as" Having a Disability*

One of the most significant changes made by the ADAAA involves the definition of individuals who are "regarded as" having a disability. As defined under the ADA, a person who was regarded as having an impairment that substantially limits a major life activity qualifies as an individual with a disability even if that person does not actually have an impairment at all, or if that person does not have an impairment that substantially limits a major life activity.[46] The "regarded as" prong was interpreted by the Supreme Court in *School Board of Nassau County v. Arline*.[47] In this case, the Court stated that in defining disability, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as the actual impairments themselves.[48] For this reason, the EEOC stated that an individual who was rejected from a job because of such myths and fears about disabilities would be covered by the ADA.[49]

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[39] 42 U.S.C. § 12102(5)(B).
[40] *Id.* § 2(b)(4).
[41] 42 U.S.C. § 12102(2).
[42] *Id.*
[43] *Id.* §(2)(B).
[44] Long, *supra* note 6, at 223.
[45] 29 C.F.R. § 1630.
[46] 42 U.S.C. § 12102(3).
[47] School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (interpreted the Rehabilitation Act, not the ADA, but the definition of an individual with a disability was nearly identical in the Rehabilitation Act as in the ADA.)
[48] *Id.* at 284.
[49] 29 C.F.R. § 1630.2(*l*).

However, in practice, the "regarded as" prong was not interpreted so broadly.[50] Courts, in interpreting the "regarded as" prong, have continuously held that the literal language of the ADA provided that an individual was covered under this prong only if that individual was regarded by the employer as having an impairment that substantially limits a major life activity.[51] Based on this strict interpretation of the "regarded as" prong, courts concluded that it was not enough for an ADA plaintiff to show that an employer based an adverse decision on uninformed stereotypes about the individual's condition.[52] Rather, an employee was required to establish that a defendant mistakenly believed that an impairment substantially limited a major life activity of the employee.[53] As a result, employees attempting to bring claims under the "regarded as" prong were frequently not able to bring such claims due to both the Supreme Court's and lower courts' narrow interpretations.

One of the purposes of the ADAAA is to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, which interpreted the "regarded as" prong broadly.[54] In *Arline*, the Court held that an individual meets the requirement of being "regarded as" having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual *or perceived* physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity.[55] Therefore, under the ADAAA, a plaintiff no longer faces the difficult task of proving that a defendant's misperception of his or her condition was *so* severe as to amount to a belief that the condition substantially limited a major life activity.[56] Instead, the ADAAA places the focus on the employer's motivation. If a plaintiff has a physical or mental impairment and can show that the impairment motivated the defendant's adverse action, the plaintiff can claim coverage under the "regarded as" prong, regardless of how limiting the impairment actually is.[57] Likewise, if the plaintiff can show that the defendant, rightly or wrongly, perceived the plaintiff as having an impairment, and that this perception motivated the adverse action, the plaintiff is covered under the

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[50] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184 (2002); Sutton v. United Airlines, Inc., 527 U.S. 471, 471 (1999).
[51] *Toyota*, 534 U.S. at 184.
[52] *See, e.g.*, *Toyota*, 534 U.S. at 184; *Sutton*, 527 U.S. at 471.
[53] *See, e.g.*, *Toyota*, 534 U.S. at 184; *Sutton*, 527 U.S. at 471.
[54] *Arline*, 480 U.S. at 284.
[55] 42 U.S.C. § 12102(4).
[56] *Id.*
[57] *Id.*

"regarded as" prong, regardless of how limiting the defendant perceives the impairment to be.[58]

The ADAAA represents a dramatic change that may greatly expand coverage under the "regarded as" prong. However, in a pro-employer move, the ADAAA places a restriction on the expanded coverage by specifically exempting transitory and minor impairments. The ADAAA specifies that an individual who is subjected to an adverse action because of an actual or perceived impairment is not covered under the "regarded as" prong if the impairment is transitory and minor.[59]

One of the most fundamental components of the ADA and ADAAA is the reasonable accommodation requirement. The ADAAA, while making many amendments to the ADA, did not amend the reasonable accommodation requirement. The main changes to the requirement of reasonable accommodation, then, relate to the expanded definition of disability and thus to who must now be reasonably accommodated. Concerning who is entitled to reasonable accommodation, the ADAAA clarifies that employers are not required to provide reasonable accommodation for an individual who meets the "regarded as" definition.[60] Besides this clarification, employers are subject to the same reasonable accommodation requirements as under the ADA; that is, employers are required to provide reasonable accommodations for the known physical or mental impairments of qualified individuals with disabilities.[61]

Specifically, Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless doing so would cause an undue hardship, or unless a direct threat exists.[62] There are three types of reasonable accommodations: (1) modifications or adjustments to a job application process, (2) modifications or adjustments to the work environment, or to the manner or circumstances under which they are typically performed, or (3) modifications or adjustments that enable a covered employer's employee with a disability to enjoy equal benefits and privileges of employment.[63] Further, in order to qualify as a reasonable

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[58] *Id.*

[59] 42 U.S.C. § 12102(4)(A) (defines transitory impairments as impairments with an actual or expected duration of six months or less, and does not define minor impairments).

[60] 42 U.S.C. § 12201(h).

[61] 42 U.S.C. §§ 12101-17, 12201-13.

[62] *Id.*

[63] 29 C.F.R. § 1630.2(o)(1)(i)-(iii).

accommodation, an accommodation must be effective, that is, it must meet the needs of the individual with a disability.[64]

To determine whether an accommodation is reasonable, one must consider whether the accommodation is for an essential function of the job.[65] An employer is not required to eliminate an essential function of the job because a person who is unable to perform the essential functions of the job with or without reasonable accommodation is not a "qualified" individual with a disability.[66] With respect to determining the essential functions of the job, "consideration shall be given to the employer's judgment..., and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[67] An employer is also not required to lower qualification standards that are required of all employers in order to employ an individual with a disability. However, an employer may be required to provide reasonable accommodations if doing so would enable an employee with a disability to meet production standards.[68]

Furthermore, an employer need not provide reasonable accommodation if doing so would cause undue hardship to the employer.[69] Undue hardship is the only specific statutory limitation on the employer's obligation to provide reasonable accommodation.[70] "Undue hardship" means significant difficulty or expense and is determined with respect to the circumstances and resources of the specific employer.[71] In determining whether an accommodation would impose an undue hardship on an employer, many factors must be considered, including, among other things: the nature and cost of the accommodation, the overall financial resources of the specific facility as well as the individual employer, the number of individuals employed, and the effect accommodation will have on the operation of the facility.[72] Finally, an employer is not required to provide a reasonable accommodation if the covered individual is not a qualified individual because she will pose a direct threat even with a reasonable

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[64] *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
[65] 42 U.S.C. § 12111(8).
[66] *Id.*
[67] *Id.*
[68] *Id.* § 12113(a).
[69] *Id.* § 12111(10)(A).
[70] *Id.*
[71] 42 U.S.C. § 12111(10)(B).
[72] *Id.*

accommodation.[73] An individual poses a "direct threat" if she poses a significant risk to the health or safety of others.[74]

In order for an employer to properly facilitate a reasonable accommodation, the employee must make the request known to the employer.[75] This request is the first step of the interactive process that must take place between the employer and the employee in order to reach a reasonable accommodation.[76] The EEOC defines the interactive process as "an informal, interactive process . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[77] The EEOC's interpretive guidelines further states that once a qualified individual has requested a reasonable accommodation, "the employer must make a reasonable effort to determine the appropriate accommodation.[78] The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability."[79]

In order to request reasonable accommodation an employee or applicant for employment need not use specific "reasonable accommodation language."[80] The request for reasonable accommodation also need not be in writing, but can be done through any mode of communication.[81] Further, an individual with a disability may request a reasonable accommodation at any time during the period of employment or the application process.[82] After a request for accommodation has been made, the employer and employee should engage in an informal process to clarify what the needs of the individual are and to identify the appropriate reasonable accommodation.[83] While the employer is required to provide reasonable accommodation, the employer is not required to

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[73] *Id.* § 12113.
[74] *Id.*
[75] *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997), http://www.eeoc.gov/policy/docs/psych.html (last visited Feb. 10, 2010).
[76] 29 C.F.R. § 1630.2(o)(3).
[77] *Id.*
[78] *Id.*
[79] 29 C.F.R. § 1630.
[80] *See, e.g.,* Schmidt v. Safeway Inc., 864 F. Supp. 991, 997 (1994) ("statute does not require the plaintiff to speak any magic words. . . The employee need not mention the ADA or even the term 'accommodation.'").
[81] *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 75.
[82] *Cf.* Masterson v. Yellow Freight Sys., Inc., Nos. 98-6126, 98-6025, 1998 WL 856143 (10th Cir. Dec. 11, 1998) (holding that the fact that an employee with a disability does not need a reasonable accommodation all the time does not relieve employer from providing an accommodation for the period when he does need one).
[83] *See* 29 C.F.R. § 1630; 29 C.F.R. § 1630.2(o)(3).

provide the specific accommodation requested.[84] Rather, the employer can choose among reasonable accommodations, as long as the accommodation chosen is effective.[85] The employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[86] Finally, an employer may not require a qualified individual with a disability to accept an accommodation if she does not want one.[87] However, if an employee needs a reasonable accommodation, either to perform an essential function of the job or to eliminate a direct threat, and refuses to accept an effective accommodation, she may not be qualified to keep her job.[88]

III. PRELIMINARY REGULATORY IMPACT ANALYSIS AND ITS MANY ASSUMPTIONS

The EEOC's Notice of Proposed Rulemaking attempts to forecast the economic impact the new regulations will have.[89] Although it does properly conclude that the benefits of the ADAAA exceed the costs, the EEOC admits that the studies conducted reveal "a large variance" in the estimates of the cost of providing accommodations, ranging from $462 to $1,434.[90] Despite this "large variance," the EEOC maintains that the impact of the new regulations "will very likely be below the $100 million threshold for 'economically significant' regulations."[91] However, given the extensive assumptions and estimations involved in determining the regulatory impact, as well as the limited statistical information, it is not clear that the impact will be quite so low.

A. *The EEOC's Problematic Assumptions*

The Preliminary Regulatory Impact Analysis begins with a discussion of the assumptions made. Although not every one of these assumptions is extremely problematic on its own, the combination of so many assumptions results in an impact analysis that is less than reliable.

The first assumption discussed by the EEOC concerns the cost of accommodation based on the definition of an individual with a disability. The EEOC claims that the fact that many plaintiffs lost reasonable

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[84] *Id.* § 1630.
[85] *Id.*
[86] *Id.*
[87] 42 U.S.C. § 12201(d).
[88] *See* 42 U.S.C. § 1630.
[89] 29 C.F.R. § 1630.
[90] *Id.*
[91] *Id.*

accommodation cases does not necessitate the conclusion that employers denied accommodation requests because they concluded that individuals did not meet the definition of "disability."[92] However, while it is possible that the majority of plaintiffs did not lose reasonable accommodation cases as a result of employers concluding they were not disabled, it is more likely that this is exactly why many plaintiffs lost reasonable accommodation cases. In fact, given the language used by Congress in the Findings and Purposes section of the ADAAA, it seems that employers had been doing exactly that – determining an individual was not disabled and consequently denying the accommodation request.[93] Furthermore, lower courts and even the Supreme Court supported this narrow interpretation of the definition of an individual with a disability, lending more support to employers' accommodation denying actions.[94] In the findings section of the ADAAA, Congress stated that the intention of the ADA was that the definition of disability would be interpreted consistently with the way courts had interpreted the definition of a handicapped individual under the Rehabilitation Act of 1973.[95] Congress went on to state that that expectation had not been fulfilled citing both *Sutton*[96] and *Toyota*[97] as examples of the Supreme Court's narrowing the definition of an individual with a disability. Congress stressed that lower courts have "incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities"[98] Congress further discussed the purposes of the ADAAA with respect to the definition of disability by stating that

> it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[99]

Thus, employers' use of a narrow definition of an individual with a disability was one of the main problems the ADAAA was enacted to address.[100] Congress's obvious concern with the definition of disability and its command that extensive analysis not be spent on such a determination

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[92] *Id.*
[93] 42 U.S.C. § 12101.
[94] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184 (2002); Sutton v. United Airlines, Inc., 527 U.S. 471, 471 (1999).
[95] 42 U.S.C. § 12101(a)(3).
[96] *Sutton*, 527 U.S. at 471.
[97] *Toyota*, 534 U.S. at 184.
[98] *Id.*
[99] *Id.*
[100] *Id.*

are proof that this problem exists. Furthermore, even if this command does not provide explicit evidence against the EEOC's assumption, it certainly sheds some doubt on the assumption.

The next assumption discussed by the EEOC concerns the prior coverage of specific impairments. The EEOC states that it is incorrect to assume that types of impairments such as cancer, epilepsy and diabetes were not already covered under the prior definition of disability.[101] The EEOC claims that many people with cancer, epilepsy, diabetes, and other similar types of impairments were already covered under the prior interpretation of the law and by those employers who voluntarily complied with it.[102] While it may be the case that these impairments were covered under the EEOC's interpretation of the ADA, they were not actually part of the ADA, and the EEOC's regulations did not have force of law. So, while some employers voluntarily complied with the EEOC's prior interpretation, not all employers did. Now, however, these impairments are explicitly part of the ADAAA.[103] Because the ADAAA specifically includes these kinds of impairments, all employers must now act in compliance with that fact. The EEOC does not specify how many employers voluntarily complied with the prior EEOC interpretation, but certainly not all employers complied. Consequently, although the specific effect of this change is not known, it at least appears to be more than the EEOC implies.

The EEOC then states that many of the individuals who are actually brought in under the new definition of disability are more likely to have less severe limitations and thus less likely to need extensive accommodations.[104] However, as explained above, it is not necessarily the case that employers have reasonably accommodated employees with impairments such as cancer, epilepsy, diabetes. Moreover, it is not unreasonable to interpret such impairments as potentially severely limiting, and it is possible that such impairments might require extensive accommodations. Furthermore, it is not unreasonable to assume that accommodating individuals with such impairments might be expensive, as it is probable that such individuals might often need to miss work that can be both logistically and economically challenging for employers.

The ADAAA also adds learning disabilities to the list of Major Life Activities.[105] This addition could quite possibly have a huge effect on employers. Individuals with learning disabilities are often severely limited in their ability to work and may require extensive accommodations from an

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[101] 29 C.F.R. § 1630.
[102] *Id.*
[103] 42 U.S.C. § 12102(4)(D).
[104] *Id.*
[105] *Id.* § 12102(2).

employer.[106] Moreover, even individuals whose limitations are not as severe and may not require extensive accommodations will contribute to the overall economic effect. The sheer amount of individuals who previously would not have qualified as individuals with disabilities under the ADA but who are now covered under the ADAAA will require employers to provide many more accommodations. Even if those accommodations are not as extensive, the large amount of individuals now covered will greatly increase the number of accommodations required and will have more than a nominal effect.

The EEOC discusses other assumptions that contributed to the evaluation of the total cost of the ADAAA to employers.[107] These other assumptions are less problematic, and therefore will be discussed more briefly. The EEOC states that, with respect to the individuals who are now covered under the ADAAA who both request and need accommodation, employers will sometimes provide such accommodations through existing policies and procedures like the use of accrued annual or sick leave, flexible schedule options, voluntary transfer programs, and "early return to work" programs.[108] The EEOC also states that such accommodations might be provided for by other statutes like the FMLA[109] and worker's compensation laws. The EEOC also states that some individuals who request accommodation will not be entitled to it because they do not need it; because the accommodation poses an undue hardship on the employer; because the accommodation would not make them "qualified" to perform the essential functions of the job; or because they would pose a direct threat to safety even with the accommodation.[110]

Although possible, it is unlikely that an individual will request an accommodation that is not needed. It is also not extremely likely that an individual will request an accommodation that will not make them qualified to perform the functions of the job. An employer is not required to make a requested accommodation if such an accommodation would cause an undue hardship for the employer. However, because determining whether an accommodation would cause undue hardship is measured against the entire operations of the employer, not just a single department, it is hard to prove.[111] Finally, the direct threat issue is a

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[106] *See* Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 301 (7th Cir. 1999) (holding that even though employer had put in extensive time and money to train an employee with a learning disability, the employer's accommodation was not reasonable because the training was "hardly tailored to a person with learning disabilities").

[107] *Id.*

[108] 29 C.F.R. § 1630.

[109] 29 U.S.C. § 2601 (2006).

[110] 29 C.F.R. § 1630.

[111] *Id.*

legitimate consideration but will likely not have much of an effect on the economic impact. The small number of individuals who will pose a direct threat to safety will not likely have much effect on the overall economic effect on employers. Although there is certainly some economic impact resulting from employers not having to reasonably accommodate such individuals, because the number of such individuals is relatively low so will be the economic impact.

The EEOC states further that there are some offsets to costs incurred by smaller employers like free outreach and training materials.[112] Additionally, the EEOC states that smaller employers are less likely to have existing detailed procedures about reasonable accommodation that must be deleted or revised.[113] While smaller employers will likely not have to revise a detailed existing procedure, they will likely have to create new procedures from scratch. Doing so will not be without costs, especially because small businesses typically do not have human resources departments to create and oversee policies and procedures.

The EEOC ends its section on assumptions by stating that the under-utilization of tax incentives available to encourage employers to reasonably accommodate, the lag time in receipt of offsets and the fact that offsets are only partial do not necessarily support greater costs because such incentives typically relate to more severe disabilities that were covered prior to the ADAAA.[114] Although this may be the case, it is not likely that all of the accommodations will be for severe disabilities or disabilities that were covered prior to the ADAAA, especially in light of the broadened definition of who qualifies as an individual with a disability.

B. *Use of Limited Studies Leads to Questionable Results*

Before discussing the statistical data related to the cost of reasonable accommodation, the EEOC notes that there is not extensive data on the costs of providing reasonable accommodations for applicants and employees with disabilities.[115] The EEOC further notes that much of the data collected about the economic cost of reasonable accommodation was obtained through surveys that collected little information, or surveys that were limited in sample size.[116]

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[112] For free outreach and training materials, see http://www.ada.gov.
[113] 29 C.F.R. § 1630.
[114] *Id.*
[115] *Id.*
[116] *Id.*

1. *Examining the Cost of Reasonable Accommodation under the ADA*

The EEOC begins its discussion of statistics by examining three different cost studies in order to determine what the cost of reasonable accommodation has been prior to the ADAAA. The first study examined by the EEOC is a study conducted by Schartz, Hendricks, and Blanck.[117] The Schartz article discussing the study begins with a discussion of past empirical research regarding the cost of accommodation, stating three different studies found the average cost of accommodation to be wildly different.[118] The first study found the average cost of accommodation at a major retailer to be $45.[119] The second study from 1996 found the average cost of accommodation to be $200.[120] The third study, which examined Job Accommodation Network data from 1992-1999, found the average cost of accommodation to be $250.[121] This research, the EEOC points out, shows that the real cost of reasonable accommodation in the workplace is unknown.[122]

In recognizing the shortcomings of past research concerning the cost accommodation, the Schartz study examined the costs of reasonable accommodation itself,[123] by relying on a Job Accommodation Network (JAN) survey.[124] The JAN survey collected data through the use of a questionnaire on which respondents were required to select costs from a range of values.[125] The average cost of accommodation was calculated based on responses to the questionnaire, however the highest range of

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[117] Helen Schartz et al., *Workplace Accommodations: Evidence-Based Outcomes,* 27 WORK: J. PREVENTION, ASSESSMENT & REHABILITATION 345 (2006).

[118] *Id.*

[119] *Id.* (citing P. D. Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part 1 — Workplace Accommodations*, 46 DEPAUL L. REV. 877 (1997)).

[120] Schartz et al., *supra* note 117 (citing D. L. Dowler et. al., *Outcomes of Reasonable Accommodations in the Workplace*, 5 TECH. & DISABILITY 345 (1996)).

[121] Schartz et al., *supra* note 117 (citing JOB ACCOMMODATION NETWORK, ACCOMMODATION BENEFIT/COST DATA TABULATED THROUGH JULY 30, 1999 (1999).

[122] 29 C.F.R. § 1630.

[123] Schartz et al., *supra* note 117, at 346.

[124] The Job Accommodation Network is a service provided by the U.S. Department of Labor's Office of Disability Employment Policy. JAN facilitates the employment and retention of workers with disabilities by providing employers information on job accommodations, entrepreneurship, and related subjects. JAN is the most comprehensive resource for job accommodations available. *See generally* The Job Accommodation Network, http://www.jan.wvu.edu.

[125] 29 C.F.R. § 1630.

values, "[g]reater than $5000," was closed at $10,000 for purposes of the calculation.[126]

The EEOC points out that the sample used in the JAN survey is arguably not a representative sample because those using "JAN to assist them in developing accommodation solutions might be confronting unique or difficult accommodation issues."[127] Consequently, the EEOC claims that the average of $865.43 might be higher than would be found in a broader sampling of employers who might be confronting less difficult accommodation issues.[128] While it is likely that employers facing unique or difficult situations will seek assistance from JAN, it is just as likely that other employers, especially smaller employers and newer employers, will take advantage of JAN's free consulting services.[129] In fact, the mere fact that JAN offers free services may attract smaller clients facing even simple accommodation issues. Moreover, a unique or difficult accommodation issue will not necessarily be more costly to an employer. Thus, the EEOC's conclusion that an average of $865.43 might be higher than the results of a broader sampling, based on an assessment of what kinds of employers are likely to use JAN's consulting services, is at least questionable.

Furthermore, it is equally probable that the average of $865.43 might be lower than the actual average due to the closing off of the last category. In order to calculate the average cost of reasonable accommodation, the last category was capped at $10,000.[130] Such a closing off of the highest range may very likely lead to an average that is not representative of employer's responses. In fact, closing this range may significantly affect the average if there were even a few respondents whose costs were over $10,000.

The second study examined by the EEOC in the Preliminary Regulatory Impact Analysis was a study conducted by the Job Accommodation Network itself, also based on JAN data.[131] This study found the average cost of accommodation to be $1434, much higher than the average cost found by the Schartz study using the same JAN data.[132] Like the Schartz study, the sample size used in this survey may not be representative of the population of employers as a whole, and therefore, the

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* (Neither the study itself, the accompanying article, nor the EEOC provide an explanation about how or why $10,000 was chosen as a limit).
[131] *Id.* (citing JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 2007).
[132] 29 C.F.R. § 1630.

cost of accommodation may not be accurate.[133] Furthermore, the result of this study may not be accurate due to the fact that the last category of ranges was capped at $10,000 in order to calculate the cost of accommodation.[134] And, like the Schartz study, such a closing off of the highest range may very likely lead to an average that is not representative of employers' responses.

The final study relied upon by the EEOC is an unpublished study by Susanne Bruyére and Lisa Nishii.[135] This study was based on a sample of approximately 5,000 respondents from one large Fortune 500 company.[136] The study showed that half of the accommodation requests by individuals with disabilities cost employers no money.[137] The study further showed that seventy-five percent of accommodation requests by individuals with disabilities cost employers less than $500.[138] This study found the average cost of reasonable accommodation to be $462.[139] Like the previous studies, this study also assumes $10,000 to be the highest cost in the last range even though the last range in the questionnaire was, again, "Greater than $5000."[140] Thus, it is subject to the same critique that the cost of accommodation is potentially much higher than the results of this survey suggest.

A more damaging problem with this study, however, is that it relies on data from only one company. Although the company is large and therefore can provide a large amount of employer respondents, the data is not necessarily a valid representation of all employers. Further, the fact that this study showed that half of the accommodation requests cost the employer no money lends itself to the conclusion that such was the case with the firm examined. If this particular company had established procedures for accommodation in place, then the numbers are clearly going to be much lower than an employer who is not in such a situation. For example, the employer questioned for this study could already have accessible entrances and exits, appropriate signage, ADA compliant workspaces, procedures for changing work hours and schedules, and modifications and division of job tasks. If such procedures are in place, it is possible that many accommodation requests will cost the employer nothing. However, many employers do not have facilities that are completely ADA

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[133] *Id.*
[134] *Id.*
[135] *Id.* (citing Lisa Nishii & Susanne Bruyére, Presentation at the 2009 American Psychological Association Convention: Protecting Employees with Disabilities from Discrimination: The Role of Unit Managers (Aug. 7, 2009)).
[136] 29 C.F.R. § 1630.
[137] *Id.*
[138] *Id.*
[139] Nishii & Bruyére, *supra* note 129.
[140] 29 C.F.R. § 1630.

compliant or established procedures and policies set up to deal with reasonable accommodation issues. Consequently, the data resulting from this study based on a single company does not seem to reflect the population of employers as a whole.

Furthermore, because this data is based on a large Fortune 500 company, the employer's human resources, financial resources, and legal resources are likely much greater than many employers, allowing for established procedures and policies that would be much more expensive and burdensome for employers with less resources. Moreover, even though two of the studies were based on data from the same source, and all three studies used the same cost value ranges, the results of the cost of accommodation varied from $462 to $1434. Thus, the cost of accommodation is obviously hard to examine.

In recognition of the fact that the cost of reasonable accommodation is hard both to examine and predict, the EEOC turned to two nationally representative surveys in order to attempt to estimate the number of affected workers and thus the cost of reasonable accommodation. The two studies examined by the EEOC — The Annual Social and Economic Supplement to the Current Population Survey (CPS-ASEC) and The American Community Survey (ACS) — are widely-used sources of information regarding the population with disabilities in the United States.[141]

2. *Estimating the Cost of Reasonable Accommodation After the ADAAA*

The EEOC notes, before examining these two surveys, that the real problem with determining the effect of the ADAAA on the cost of accommodation is determining the number of affected individuals.[142] In examining the effect of the ADAAA, the EEOC attempts to consider how many individuals with disabilities were already being reasonably accommodated under the ADA of 1990.[143] The EEOC states that the ADAAA may cause an increase in requests for reasonable accommodation from individuals who will now, under section 1630.2(j)(5) of the proposed rules,[144] consistently meet the definition of "disability" — individuals with autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, and individuals with depression, bipolar disorder, obsessive-compulsive disorder, post-traumatic stress disorder, or schizophrenia. The EEOC fails to consider, however, the effect on the cost

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

of accommodation of those who do not fit within the above categories, and who were not necessarily covered under the ADA, but who will now be covered due to the broadened definition of an individual with a disability, for example, individuals with ADHD.

The CPS-ASEC has interviewed Americans with disabilities annually since 1981 using a consistently-defined disability variable, asking: "Does anyone in this household have a health problem or disability which prevents them from working or which limits the kind or amount of work they can do? [If so,] who is that? Anyone else?"[145] The ACS is also an annual survey that has been in existence since 2000, and has been asking the same six questions in their current form since 2003.[146] The survey asks:

> [1] Does this person have any of the following long-lasting conditions: (a) Blindness, deafness, or a severe vision or hearing impairment? (b) A condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying? [2] Because of a physical, mental, or emotional condition lasting 6 months or more, does this person have any difficulty in doing any of the following activities: (a) Learning, remembering, or concentrating? (b) Dressing, bathing, or getting around inside the home? [3] Because of a physical, mental, or emotional condition lasting 6 months or more, does this person have any difficulty in doing any of the following activities: (a) (Answer if this person is 15 YEARS OLD OR OVER.) Going outside the home alone to shop or visit a doctor's office? (b) (Answer if this person is 15 YEARS OLD OR OVER.) Working at a job or business?[147]

In examining these two surveys, the EEOC noted that the more questions related to the kind of disability an individual has, the greater the likelihood that the data will return evidence that a greater number of people have disabilities.[148] Thus, the ACS found more individuals with disabilities than the CPS-ASEC. The EEOC also noted that the results of the data were affected by the way "employment" was defined.[149]

The EEOC also relies on statistics from the Centers for Disease Control and Prevention to find the average cost of accommodation.[150]

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[145] 29 C.F.R. § 1630.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See* Ctrs. for Disease Control & Prevention, Prevalence and Most Common Causes of Disability Among Adults—United States (2005),

However, these statistics do not list all types of disabilities.[151] In fact, the published data does not even include all of the above-cited disabilities that will likely, according to the EEOC, require the most accommodation.[152] However, with no better data available, the EEOC proceeded with its analysis based on numbers that do not include all disabilities, or even some disabilities cited by the EEOC as being the most determinative.

Based on this information, the EEOC concludes that people with these health conditions make up thirteen percent of workers who have work-limiting disabilities.[153] They then conclude that between 450,000 to one million workers will consistently meet the definition of "disability."[154] To arrive at the figure of 450,000 workers, the EEOC relied on data from the CPS-ASEC study that the number of individuals with disabilities is 3.5 million (multiplying that number by thirteen percent).[155] To arrive at the figure of one million workers, the EEOC relied on data from the ACS study that the number of individuals with disabilities is 8.2 million (multiplying that number by thirteen percent) to arrive at the figure of one million workers.[156] The EEOC thus concludes that one million workers represents the upper bound of those who would consistently meet the definition of "disability" under the ADAAA.[157]

The EEOC then discusses the number of individuals who will likely request reasonable accommodations based on the numbers derived from the CPS-ASEC and ACS studies representing the number of workers who will consistently meet the definition of disability.[158] In order to examine the number of individuals who will likely request an accommodation, the EEOC relies on two different studies. First, a study by Craig Zwerling, et al, stated that "[o]f the 4937 individuals in our study population, a relatively small proportion (16%) reported needing any of the 17 accommodations [that the authors list]."[159] The second study by Nishii and Bruyére, on the

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http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5816a2.htm (last visited Feb. 10, 2010).

[151] 29 C.F.R. § 1630.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Craig Zwerling et al., *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995,* 45 J. OCCUPATIONAL & ENVTL. MED. 517 (2003).

other hand, reports that eighty-two percent of disabled employees in their study requested accommodations.[160]

The EEOC uses the "upper bound" number of one million additional workers now consistently covered under the ADAAA to estimate the number of individuals likely to request an accommodation. Based on the sixteen percent reported by the Zwerling study, only 160,000 individuals with disabilities will request reasonable accommodations from employers.[161] Based on this study the total cost of accommodation will be $74 million, $138 million, or $229 million, based respectively on the Nishii and Bruyére study, the Schartz study, and the JAN study.[162] Under this assumption, the only way the cost to employers would exceed $100 million would be if all requests occurred in the first year.[163] If the numbers in the Nishii and Bruyére study are relied upon, however, the cost to employers will not exceed $100 million even if all accommodation requests came in the first year.[164] If all accommodations are not made within the first year, however, then the ADAAA is not "economically significant" based on the Zwerling study.[165]

If, on the other hand, reasonable accommodation data from the Nishii and Bruyére report is used, eighty-two percent of individuals with disabilities will request accommodations, which would result in 820,000 requests for accommodation.[166] Based on this study the total cost of accommodation will be $374 million, $709 million, or $1.17 billion, based respectively on the Nishii and Bruyére study, the Schartz study, and the JAN study. Under this "upper bound scenario," the requests are economically significant in one year. Further, even if the requests came over a five-year period, the annual costs would exceed $100 million based on both the Schartz study and the JAN study.[167]

It must be noted, however, that both of the above analyses of the cost of accommodation rely on two potentially problematic facts. The first problematic fact leads to the assumption that one million is, in fact, an upper bound. The statistic of one million people is based on the ACS, which, although it does include more questions about disabilities than the CPS-ASEC study and thus includes more individuals with disabilities, the study likely still does not include all disabilities. Second, the analyses are based on data from the Centers for Disease Control, which, the EEOC

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[160] Nishii & Bruyére, *supra* note 134.
[161] 29 C.F.R. § 1630.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*

admits, does not include all impairments that will now consistently meet the definition of disability or even all impairments that the EEOC admits are the most important to the study.

The EEOC points out that not all requests will result in an employer having to make an accommodation because the accommodation may already exist or may already be in process.[168] While that is likely to be the case eventually, it is more likely to have the effect of decreasing the cost of accommodation in the long run. In the short run, most employers will likely not have extensive accommodation procedures complying with the ADAAA in place. Further, the EEOC explicitly admits that it is possible for the cost of the ADAAA to exceed $100 million, and thus to be economically significant.[169]

Furthermore, the EEOC states that there are additional potential costs. First, employers that changed their internal policies in light of the Supreme Court decisions that have been overturned[170] will have to update their policies and procedures and train personnel to ensure appropriate compliance with the new regulation. Such administrative costs, the EEOC roughly estimates, will result in a onetime cost of approximately $70 million.[171] This $70 million added onto the lower bound scenario would potentially increase the cost of accommodation in the first year from $74 million to $147 million, thus making it economically significant.[172] As a result, it is misleading for the EEOC to claim that the promulgation of regulations to implement the ADAAA will not likely create annual costs exceeding $100 million per year, especially based on the numbers resulting from the surveys and on the potential increase in those numbers based on the various assumptions made.

A further statistical problem with the EEOC's Proposed Regulations concerns the deletion of the statutory reference to forty-three million disabled individuals.[173] The ADAAA deleted the original congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities."[174] The reason for the deletion of this statistic was not due to the fact that the number was inaccurate or too large. Rather, the number was deleted because the Supreme Court had used the

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[168] *Id.*
[169] *Id.*
[170] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184 (2002); Sutton v. United Airlines, Inc., 527 U.S. 471, 471 (1999).
[171] 29 C.F.R. § 1630.
[172] *Id.*
[173] Comments on the Proposed Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48,431 (Nov. 23, 2009).
[174] 42 U.S.C. § 12101(a)(1).

figure as an indication of Congress's intent to construe the statute narrowly so as to limit the number of people considered to be individuals with disabilities.[175]

Based on the CPS-ASEC survey, the EEOC concluded that the number of disabled people in the workforce is under five million,[176] and based on the ACS survey the EEOC concluded that the number of disabled people in the workforce is under nine million.[177] The EEOC further concluded that the additional number of workers who will now qualify as disabled under the Act is expected to be "one million . . . as an upper bound."[178]

It is not logical to conclude that the total number of disabled workers, after the passage of the ADAAA, will be under five million or even under nine million given the fact that Congress deleted the figure of forty-three million disabled individuals in order to ensure that number would not be construed as an upper bound. Congress's deletion of this figure lends further support to the argument that the surveys have underestimated the number of workers with disabilities.

As the EEOC noted at the outset, there is no extensive data on the costs of providing reasonable accommodations for applicants and employees with disabilities.[179] The EEOC further noted at the beginning that much of the data collected about the economic cost of reasonable accommodation was obtained through surveys that collected little information, or surveys that were limited in sample size.[180] Due to the lack of extensive data on the costs of providing reasonable accommodation, the numerous assumptions made to arrive at the final estimated cost, and the fact that in the end there are six different estimations of the cost of accommodation, it is clear that the cost of accommodation is unknown. Thus, the economic effect of the ADAAA is also unknown. Based on the results of the various surveys, however, it is at least reasonable to conclude that the ADAAA will have an economically significant effect on employers.

IV. THE OTHER SIDE: ARGUMENTS THAT THE EFFECT OF THE AMENDMENTS ACT IS NOT ECONOMICALLY SIGNIFICANT

While there are many arguments that the effect of the ADAAA is not economically significant, there are three main arguments. First, the Act

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[175] *See Toyota,* 534 U.S. at 197.
[176] 29 C.F.R. § 1630.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*

is not a sweeping change.[181] Second, there are cost-savings resulting from the ADAAA.[182] Third, the cost of accommodation will be reduced by technological and medical advances.[183]

Proponents of the view that the ADAAA will not have an economically significant effect cite the fact that the ADAAA is a restorative statute to support their position.[184] They argue further that medical and technological advances will cause the cost of accommodation to be reduced over time.[185] While it is true that the ADAAA is not a completely new statute and it is meant to restore the ADA, there are certainly economic implications of the new Act, especially the broadened definition of disability. Simply citing the fact that the ADAAA is meant to restore the intent and purpose of the ADA does not prove that the ADAAA will not have an economically significant effect. And while the argument that technological and medical advances will lead to reduced costs over time is not illogical, there is no evidence that such advances will, in fact, reduce the cost of accommodation. Moreover, even if advances do eventually reduce accommodation costs, the effect of the ADAAA initially will still be great.

Those who believe the ADAAA will not have an economically significant effect also argue that there are important cost savings that result from the ADAAA's clear definition of disability and the clear scope of coverage. Such clarity, it is argued, will encourage employers to focus on eliminating employment barriers and thus to spend less time challenging the individual's disability status. Furthermore, proponents of this view argue that, to the extent litigation is necessary, it will be less costly because expert witness testimony will not be needed to address definitional issues. The ADAAA will certainly have many benefits, and the benefit of reduced litigation costs is an important one for employers. However, the cost savings of reduced litigation have no effect on the cost of reasonable accommodation. The fact that employers will potentially spend less money litigating about the definition of disability does not overshadow the increased amount of money that will necessarily be spent on making reasonable accommodations. It is, however, important to include the litigation cost savings of the ADAAA in the calculation of the overall

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[181] Comments on the Proposed Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48,431 (Nov. 23, 2009).
[182] *Id.*
[183] *Id.*
[184] *See* 29 C.F.R. § 1630 (recognizing that while the ADAAA does reject previous judicially imposed interpretations of existing statutory language, "[c]learly this is not likely to be a sweeping change" for purposes of cost analysis).
[185] *Id.*

economic effect. Consequently, in order to properly determine the cost of the ADAAA, a further study of litigation savings should be conducted.

V. HOW TO PROVIDE REASONABLE ACCOMMODATIONS IN LIGHT OF INCREASED COST

The passage of the ADAAA means that many more individuals will now be protected. Consequently, more individuals will be eligible for reasonable accommodations and it is likely that more individuals will successfully bring discrimination claims for perceived failures to comply with the ADAAA. There are many things employers can do to ensure they are sufficiently prepared to comply with the ADA and avoid unnecessary litigation. In order to best comply with the ADA, employers should: (1) be careful, (2) know the rules, (3) be prepared, and (4) be aware.

First, employers must be careful. Employers must be aware that the ADAAA does not only cover employees but also job applicants.[186] Job applicants, like employees, can bring disability discrimination claims. Thus, employers must take care to comply with the ADAAA not only in the employment context but also in the application and interview process. Consequently, individuals conducting interviews must be careful not to ask questions that may reveal health or impairment issues. Of course, no employee is required to hire an individual who is not qualified for the position, but asking questions about health or impairment issues may subject the firm to claims of discrimination in the hiring process for excluding individuals with disabilities.[187]

Second, employers must be sure to know what the ADAAA and EEOC regulations say and mean. Employers must quickly learn what both the ADAAA and new regulations say in order to determine whether reasonable accommodations are appropriate, and if so, what kinds of reasonable accommodations are appropriate. Under the ADAAA and the new regulations, employers must consider not whether an individual has a disability, but whether and accommodation would be necessary, and if so, what an appropriate accommodation would be.[188] Consequently, it is important for employers to engage in an interactive process.[189] When an employee requests an accommodation, employers must make sure to dutifully engage in a discussion with that employee.[190] In engaging in the interactive process, employers should make individual assessments on a

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[186] 42 U.S.C. § 12111(8).
[187] *Id.*
[188] 42 U.S.C. § 12101.
[189] *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, (1997), http://www.eeoc.gov/policy/docs/psych.html (last visited Feb. 10, 2010).
[190] *Id.*

case-by-case basis.[191] Each individual with a disability will have different impairments and abilities requiring different accommodations. Along with determining whether an accommodation is reasonable, an employer must consider: whether an accommodation is, in fact, necessary; whether the individual with a disability is a qualified individual with a disability; whether the requested accommodation would pose an undue hardship on the employer; and finally, whether an accommodation is not required because the covered individual would pose a direct threat.[192]

Third, employers must not only know the rules and take steps to ensure they are in compliance with the new rules, but they must also take steps to ensure they appear to be in compliance. To do so, employers must make sure rules are applied consistently to all employees and applicants before taking any negative action against an individual with a disability in order to ensure there is no suggestion of retaliation. Employers should also take care to review and reword job descriptions so they accurately capture the essential functions of each individual job position. Employers should also review and update their existing ADA policies and procedures so that they comply with the ADAAA, (or put into place policies and procedures if they are not already in existence). After Supreme Court decisions like *Toyota*[193] and *Sutton*[194], many employers changed their policies and procedures to comply with the Court's interpretation. These decisions have been overturned by the ADAAA[195] and, therefore, such policies must be updated. Job descriptions, policies and procedures must be internally consistent, current, and easily defensible in order for employers to be adequately protected.

It is just as important for employers to have an organized system of recordkeeping in place to document every employment decision made. This recordkeeping will provide employers with the ability to justify employment decisions in order to defend against ADAAA discrimination claims. Additionally, it is imperative that employers train their supervisors and human resources departments to understand and implement the requirements of the ADAAA. Employers should not only train supervisors about the new requirements and procedures but create a centralized accommodation review process involving the human resources department. Such centralization will help employers avoid disparate treatment among different employers in light of the fact that many more employers will now be covered. For smaller employers who are subject to the ADAAA but do not have human resources departments, training is even more important.

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[191] *Id.*
[192] *Id.*
[193] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 184 (2002).
[194] Sutton v. United Airlines, Inc., 527 U.S. 471, 471 (1999).
[195] 42 U.S.C.A. § 12101 (West 2008).

Without a human resources department to ensure that the employer is not engaging in disparate treatment and is fully complying with all provisions of the ADAAA, it is essential that all managers are aware of the rules of the ADAAA in order to avoid litigation.

Finally, employers must be aware of the progression of disability law under the ADAAA. In light of the new ADAAA and the new EEOC regulations, there will likely be more claims of disability discrimination and therefore more court rulings concerning the ADAAA and reasonable accommodation. In accordance with the explicit purpose of the ADAAA as well as with Congress's intent, it is likely that employees will gain further protections under the Act.[196] Therefore, employers should be continually aware of the way the ADAAA is being interpreted and expanded. Understanding the ADAAA and the EEOC's regulations is important, but it is not enough to stay continually compliant.

VI. CONCLUSION

Congress specifically enacted the ADAAA to address the shortcomings of the ADA and to ensure that individuals with disabilities were adequately protected.[197] In order to do this, the ADAAA along with the EEOC's Proposed Regulations created a very broad definition of disability.[198] This newly broadened definition will have an obvious effect on both those who have disabilities as well as on those who are employing individuals with impairments. In the Preliminary Regulatory Impact Analysis, the EEOC discussed the economic impact of the new law and regulations, concluding that it is not likely that the impact of the regulations will be economically significant.[199] However, to arrive at this conclusion, the EEOC relies on many problematic assumptions and incomplete studies. At best, the conclusion that the effect will be less than economically significant is a lucky guess, and at worst, it is misguided and incorrect.

In light of the potentially large increase in costs to employers, it is imperative for employers to take steps to comply with the law as quickly as possible. While it is impossible for employers to avoid all costs of accommodation, it is certainly possible for employers to avoid unnecessary litigation. It is also possible for employers to keep costs to a minimum by knowing the law, putting into place policies and procedures that are in compliance with the ADAAA's requirements of reasonable accommodation, and making sure to engage in an interactive process with both employees and applicants requesting accommodation. The fact that the ADAAA is likely more economically significant than the EEOC does

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[196] *Id.*
[197] *Id.*
[198] 42 U.S.C. § 12102.
[199] 29 C.F.R. § 1630.

not overshadow the fact that it is an important statute with a very important purpose. Further, while the ADAAA will result in economic costs to employers, its benefits to individuals with disabilities, employers, and the workforce as a whole is worth the costs, even the potentially extensive costs.